SUPREME COURT, U.S.
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No. 01-841

IN THE
Supreme Court of the United States

CHARLOTTE J. CHENOWETH,

Petitioner,

v.

HILLSBOROUGH COUNTY, a political subdivision of the State of Florida,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Petition satisfies any of the standards for considerations governing review on certiorari pursuant to Rule 10, Rules of the Supreme Court of the United States.

Whether Petitioner may properly raise issues for the first time in her Petition which have not previously been raised in her arguments below.

Whether Petitioner demonstrated a substantial limitation in any major life activity where she only had three isolated and temporary seizures over a seven-month period of time.

Whether Petitioner demonstrated that she was substantially limited in the major life activity of reproduction and, if so, whether Respondent could have ever reasonably accommodated the alleged limitation.

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STATEMENT OF THE CASE

Ms. Chenoweth began her employment with Hillsborough County on March 27, 1995. (R1-16-4). Ms. Chenoweth was employed as a "Utilization Review Nurse" in the Department of Health and Social Services. (R1-14-24). In approximately January of 1997, Ms. Chenoweth was diagnosed with epilepsy. (R1-14-3). Ms. Chenoweth began taking medication to control her epilepsy in January, 1997. (R1-14-3). Ms. Chenoweth testified on November 29, 1999, that she has suffered three seizures, in the time frame of January, 1997 to August, 1997. (R4-80-2). As a result of seizures occurring in January and/or February of 1997, Ms. Chenoweth's physician, Dr. James Stevenson, requested that she discontinue driving. (R4-81-65). Ms. Chenoweth resumed driving in March of 1998. Ms. Chenoweth made a request for an accommodation on May 21, 1997 to be allowed to work at home because of her difficulty in getting to and from work. (R1-16-5). Ms. Chenoweth made an additional request for accommodation on August 15, 1997 for variable work hours in order to accommodate her transportation problems and to accommodate her doctor's appointments. (R1-16-8). Hillsborough County denied both accommodations on May 23, 1997 and August 26, 1997, respectively. However, Hillsborough County did provide Ms. Chenoweth with an accommodation of not requiring her to drive between sites during the work day. (R4-80-3).

With respect to Ms. Chenoweth's contention that she was substantially limited in the major life activity of reproduction, Ms. Chenoweth's physician, Dr. James Stevenson, stated that there was insufficient information or data to establish whether birth defects were actually increased in patients who were taking Lamictol, which was the medication Ms. Chenoweth had been taking exclusively since April of 1997. (R4-80-15).

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT SATISFY ANY OF THE STANDARDS FOR CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI PURSUANT TO RULE 10, RULES OF THE SUPREME COURT OF THE UNITED STATES.

Although not "fully measuring the Court's discretion," Rule 10, Rules of the Supreme Court of the United States, provides some indication as to the reasons the Court considers in determining whether to grant certiorari review. The rule provides in pertinent part as follows:

a. A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power;

b. A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

c. A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

In her petition, Ms. Chenoweth does not even suggest that her request for certiorari review by this Court meets any of the standards set forth in Rule 10. In fact, there is no mention of Rule 10 to be found anywhere in the petition.

The only remote possibility for applying Rule 10 to Ms. Chenoweth's petition is the standard set forth in Rule 10(c). However, Hillsborough County respectfully submits that, in this case, the Eleventh Circuit Court of Appeals did *not* decide an important question of federal law that has not been settled by this Court. To the contrary, the Circuit Court correctly cited to and applied this Court's holdings in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) and *Bragdon v. Abbott*, 524 U.S. 624 (1998). In addition, the Circuit Court's holding is perfectly consistent with the relevant decisions of this Court.

In her petition, Ms. Chenoweth argues only that the Circuit Court did not address various factual considerations in its opinion and that it misapplied the Americans With Disabilities Act ("ADA") to her specific factual situation. Hillsborough County submits that such arguments, even if true, should not be a proper basis for this Court to exercise its discretionary certiorari review.

II. THE PETITIONER MAY NOT RAISE ISSUES FOR THE FIRST TIME IN HER PETITION WHICH HAVE NOT PREVIOUSLY BEEN RAISED IN HER ARGUMENTS BELOW.

Throughout the course of the proceedings in this case, Ms. Chenoweth has repeatedly attempted to salvage her ADA claim by coming up with new major life activities, after failing at various stages below to persuade the District Court or Circuit Court that she was substantially limited in any of her previously asserted major life activities. Originally, in her Amended Complaint, the only specific "major life activity" with which Ms. Chenoweth claimed to be having difficulty was driving to and from work. After realizing that driving was not considered a major life activity, Ms. Chenoweth began to argue, in response to Hillsborough County's Motion for Summary Judgment, that she was substantially limited in such novel "major life activities" as choosing a mate, water skiing, snorkeling, swimming, and changes in atmospheric pressure. (R4-81). Ms. Chenoweth also began to argue that she was substantially limited in the major life activity of reproduction, even though her own treating physician had testified that there was an insufficient amount of medical research to determine whether or not the medication she was taking actually placed her at an increased risk for birth defects, in the event she would some day choose to have a child.

In her arguments to the Circuit Court, Ms. Chenoweth limited the major life activities in which she claimed to be substantially limited to driving, working, and reproduction. The Eleventh Circuit dealt directly with each of these three major life activities, and specifically and correctly explained

its rationale in rejecting Ms. Chenoweth's contention that she was substantially limited in any or all of these alleged major life activities.

In her Petition to this Court, Ms. Chenoweth once again broadens her possible list of major life activities by framing the issue before this Court as "whether there is *any* major life activity that was substantially limited by her seizures." (emphasis in original). In framing the issue in this manner, Ms. Chenoweth now seems to be asking this Court to identify the major life activity in which she could be substantially limited. However, an ADA claimant must specify which major life activity has been limited by his or her impairment, and only those grounds specifically raised should be considered on appeal. *See Sinkler v. Midwest Property Management Limited Partnership*, 209 F.3d 678 (7th Cir. 2000).

III. PETITIONER DID NOT DEMONSTRATE A SUBSTANTIAL LIMITATION IN ANY MAJOR LIFE ACTIVITY WHERE SHE HAD ONLY THREE ISOLATED AND TEMPORARY SEIZURES OVER A SEVEN-MONTH PERIOD OF TIME.

Ms. Chenoweth's argument that she was substantially limited in any major life activity is undercut by the fact that, by her own admission, she only suffered three temporary seizures in a seven-month period between January, 1997, and August, 1997. Although she claims to have suffered numerous but temporary auras after that time, there were no further seizures. Ms. Chenoweth's argument therefore fails to recognize that temporary conditions are routinely not considered to be substantially limiting. *See Hilburn v. Murata*

Electronics North America, Inc., 181 F.3d 1220 (11th Cir. 1999); *Mathews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997). *See also* 29 C.F.R. 1630.2(j). Even as of the time that Ms. Chenoweth requested reasonable accommodations in order to get to and from work, Ms. Chenoweth's seizures were very infrequent and very brief in duration. Therefore, at no time could Ms. Chenoweth's seizures be characterized as substantially limiting any of her major life activities.

IV. PETITIONER FAILED TO DEMONSTRATE THAT SHE WAS SUBSTANTIALLY LIMITED IN THE MAJOR LIFE ACTIVITY OF REPRODUCTION OR THAT THERE WAS ANY REASONABLE ACCOMMODATION THAT COULD BE PROVIDED.

Ms. Chenoweth's argument with respect to her alleged substantial limitation in the major life activity of reproduction, is equally unpersuasive. In essence, Ms. Chenoweth argues that because she was placed at an increased risk for having a child with birth defects as a result of the medication she was taking, her employer should have permitted her to work at home or to have a flexible work schedule. The Eleventh Circuit correctly determined that Ms. Chenoweth's requested accommodations had no relationship to her alleged substantial limitation in the major life activity of reproduction.

Even assuming that Ms. Chenoweth could establish that she was substantially limited in the major life activity of reproduction, there would be absolutely no accommodation that could be provided to her that would accommodate the alleged limitation. Ms. Chenoweth has testified that there was nothing Hillsborough County could do to accommodate

her alleged limitation in reproduction. (R4-80-16). *See also Quick v. Tripp, Scott, Conklin & Smith, P.A.*, 43 F. Supp.2d 1357 (S.D. Fla. 1999). (questioning how an employer can reasonably accommodate an ADA plaintiff whose asserted impairment substantially limits the reproduction system: "The Court cannot find any accommodation that would suffice to increase reproductive capabilities, especially in the employment context.")

CONCLUSION

The District Court and Circuit Court precisely followed this Court's directive in *Sutton* to perform an individualized inquiry with respect to Ms. Chenoweth, taking into account the corrective measures such as medication that she might be taking. In doing so, the Courts below correctly found that Ms. Chenoweth, based upon her individual situation, was not disabled under the ADA. The holding of the Eleventh Circuit is specific to Ms. Chenoweth, and, contrary to her assertions in the petition, does not stand for the proposition that epilepsy in general does not constitute a disability or that people who suffer from epilepsy cannot demonstrate that they are disabled for purposes of the ADA.

For the foregoing reasons, Ms. Chenoweth's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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